

University of Nevada, Reno

**Guardianship of the Elderly – Salient Associated Aspects
and the
Law of Incapacity in Pennsylvania**

A thesis submitted in partial fulfillment of the
requirements for the degree of Master of Judicial Studies

by

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May, 2018

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ABSTRACT

Guardianship was introduced during the ancient Roman times of Cicero. Modern American guardianship law originated in English common law and a statute, *De Praerogative Regis*, i.e., the king's prerogative, dating from the beginning of the fourteenth century.¹

Pursuant to this statute, jurisdiction over persons "of unsound mind" is believed to have been taken by the crown from the feudal lords and exercised as part of the royal prerogative.² *De Praerogative Regis* provided that "the King shall have the custody of the lands of natural fools, taking the profits of them ... and shall find them their necessaries" and that "the King shall provide when any, that before time hath had his wit and memory, happen to fail of his wit ... that their lands and tenements shall be safely kept ... and the residue beside their sustentation shall be kept to their use, to be delivered unto them when they come to their right mind ..."³ Thus, it is clear that from a very early date, there was a perceived public interest in looking after the assets of any person "whose wit and memory have failed."⁴

The need for guardianship was determined by an inquisition and an investigation of the facts before a sworn jury composed of twelve men. The emphasis of early guardianship laws on property matters can be found by the exercise of decision-making

¹ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 16.

² Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 71-72.

³ *Id.* at 72.

⁴ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 16.

capacity on behalf of incapacitated persons, through the Exchequer, or Finance Minister, as an aspect of tax collection. The use of guardianship to safeguard a ward's personal well-being is of more recent vintage.

The ethical justification for state legislative and judicial imposition of a surrogate decision maker for an incapacitated individual, with regard to both personal and financial decisions, is found in two fundamental and related principles. The principle of non-maleficence instructs us to “do no harm” to others, while the related precept of beneficence encourages us to help others who need assistance; that is, to affirmatively “do good” unto others. These ethical propositions have been transformed into the legal doctrine of *parens patriae*, or father of the land; the inherent authority and responsibility of a benevolent society to intervene, even over objection, to protect people who cannot protect themselves. As a result, instead of abandoning cognitively incapacitated individuals to a superficial meaningless autonomy to make self-harmful decisions or to neglect their own basic needs, the state may exercise its authority to protect even unwilling disabled individuals from their own folly or intellectual deficits.⁵

This thesis first discusses certain salient associated aspects of guardianship as it relates to the elderly. It then examines the law in Pennsylvania relative to Incapacitated Person, 20 Pa. C.S.A. §5501, et seq., presenting a review for the legal community of Chapter 55 of the Probate, Estates and Fiduciaries Code, in an effort to inform unwitting jurists and practitioners alike, of possible awaiting pitfalls.

⁵ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 16-17.

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CHAPTER ONE: INTRODUCTION

Major changes are occurring in the population of the United States, particularly with respect to the elderly. The “number of elderly persons has almost doubled since 1960, from nearly 17 million to a projected 51.1 million by 2020”⁶ and the “most rapid growth will occur among the 85 and older population, which will triple by 2020.”⁷ For the general population of elderly, a “consequence of the decrease in mortality has been an increase in elderly persons with chronic impairments and functional disabilities.”⁸

Elderly persons who suffer the loss of their decision-making capacity and the ability to care for their person and their finances are especially vulnerable to self-neglect and abuse by others. Individuals, mainly family members, and organizations, such as state or private agencies, that are responsible for caring for elderly persons who have become incapacitated, have to ascertain methods of protecting the elderly from themselves and designing others. Protection usually consists of some form of surrogate management in which decisions are made by substitutes for incapacitated elderly persons.⁹

The most immediate and frequently used source of potential surrogate decision makers is family members and trusted friends. Optimally, relatives and associates know an elderly person’s best interests at the forefront in making decisions for him or her.

Relatives and friends acting as surrogate decision makers often provide the

⁶ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 4.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 3.

necessary concern and action to enable elderly persons to continue to live safe and comfortable lives, even as their decision-making capacity declines. For other older adults, however, such persons are not available, not able, or not willing to function as surrogate decision makers. Even worse, some persons who are capable and willing to serve as surrogate decision makers will make decisions in their own interests rather than in the best interests of the elderly person. This can result in physical, psychological, or financial abuse of the aged individual.¹⁰

A) Voluntary Surrogate Management Arrangements

Surrogate management has been defined as, “a formal relationship established for the purpose of allowing another person or entity to make decisions for an adult who has or expects to have significantly limited mental capacity.”¹¹ Some surrogate management arrangements can be established by persons while they have capacity, in preparation for the possible advent of incapacity. Such voluntary arrangements include advanced directives, i.e., durable powers of attorney and living wills, and other legal arrangements for property management and disposition, such as joint ownership and trust agreements.

A durable power of attorney involves the elderly person, the principal, giving another individual, the agent, the power and authority to act on his or her behalf. The powers are specified in a legal document and may be very broad or very specific. No powers other than those identified are transferred to the agent, or attorney-in-fact. The special feature of a durable power of attorney is that it endures or continues in effect if

¹⁰ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 6.

¹¹ *Id.*

and when the elderly person becomes incapacitated. In contrast, a nondurable power of attorney ceases to be operative when the principal becomes incapacitated.

The danger with a durable power of attorney is that the power may be misused by the agent. There is no formal supervision or monitoring of the performance of the surrogate, and the agent has a legal document attesting that he or she has the authority to act on behalf of the principal.¹²

B) Involuntary Surrogate Management Arrangements

When no advance planning has been undertaken by an elderly individual, and the person becomes incapacitated, there are two surrogate management arrangements that can be established: representative payeeship, and guardianship. A representative payee is a person to whom certain government benefit checks are sent or deposited rather than to the person entitled thereto. The role of the representative payee is to use the money for the needs of the other individual. This arrangement is established by the government agency paying the benefits, and is relatively easy to initiate. Once again, poor monitoring is the principal drawback to a representative payeeship.

Guardianship, on the other hand, is a more complicated surrogate management arrangement but, in contrast to a representative payeeship, is more carefully overseen. It can be established in the absence of any advance directives, and takes precedence over certain established surrogate management arrangements, such as a durable power of

¹² Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 6-7.

attorney. Guardianship is a legal process that is achieved through court intervention.¹³

It has been estimated that between 500,000 and 1,250,000 adults are under guardianship in this country. Additionally, thousands of new adult guardianship cases are initiated each year among the fifty states and the District of Columbia, each with its own guardianship statute. Therefore, it is critical that those persons, agencies, and institutions likely to become involved in guardianship proceedings understand the mechanism of guardianship, and how the imposition of a guardianship may affect the person over whom guardianship authority is sought.¹⁴

In this regard, an elderly person under guardianship, the ward, has been placed under guardianship because of the loss of the ability to make basic personal decisions. As a consequence, guardianship strips the ward of many legal rights, powers, and privileges, such as the ability to sign legally binding documents. A basic understanding of what can occur before, during, and after guardianship can have practical value for persons dealing with the elderly.¹⁵

My judicial assignment requires my involvement with elderly individuals. I was asked to assume responsibility for all guardianship cases within my county, something for which I previously had only very limited exposure and associated knowledge, in my representative role as an attorney.

It is for this reason that I have chosen to submit my thesis appertaining to salient issues associated with guardianship, and specifically, with regard to the law thereof in

¹³ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 7-8.

¹⁴ *Id.* at 8.

¹⁵ *Id.* at xi.

Pennsylvania. It is my sincere hope that this undertaking will be informative, educational, and have much pragmatic application for all court actors involved in the guardianship process.

CHAPTER TWO: LITERATURE REVIEW

Guardianship is statutory in creation, thus all jurisdiction and authority arises therefrom and is vested therein. Numerous treatises discuss this subject matter and provide invaluable resource material. Practicing attorneys and judicial officers involved with guardianship proceedings have these items readily available for their edification.

In Pennsylvania, guardianship law is codified in *Purdon's Pennsylvania Consolidated Statutes Annotated - Title 20 Pa. C.S.A. §1 to 2500*, *Purdon's Pennsylvania Consolidated Statutes Annotated - Title 20 Pa. C.S.A. §1 to 2500 - Cumulative Annual Pocket Part 2017*; *Purdon's Pennsylvania Consolidated Statutes Annotated - Title 20 Pa. C.S.A. §2501 to 3300*, *Purdon's Pennsylvania Consolidated Statutes Annotated – Title 20 Pa. C.S.A. §2501 to 3300 Cumulative Annual Pocket Part 2017*; *Purdon's Pennsylvania Consolidated Statutes Annotated - Title 20 Pa. C.S.A. §3701 to 7100*, and *Purdon's Pennsylvania Consolidated Statutes Annotated - Title 20 Pa. C.S.A. §3701 to 7100 Cumulative Annual Pocket Part 2017*.

Published treatises that discuss the issue of guardianship law include: *West's Pennsylvania Practice Series - Volume 19 - Pennsylvania Probate and Estate Administration - Fifth Edition*, written by David C. Cleaver; *Partridge-Remick Practice and Procedure in the Orphans' Court Division Court of Common Pleas of Pennsylvania*, authored by Charles W. Frampton, Esquire; and *Partridge-Remick Practice and*

Procedure in the Orphans' Court of Pennsylvania - Revised 2016 Cumulative Supplement; by Charles W. Frampton, Esquire, and Paul C. Heinz, Esquire; *Pennsylvania Orphans' Court Commonplace Book, Second Edition - Volume III - Revised* (2016), drafted by Judge David G. Hunter, M. Paul Smith, Esquire, and J. Brooke Aker, Esquire; *Pennsylvania Keystone - Lawyer's Desk Library of Practice - Binder 4*, prepared by Burton R. Laub; *Standard Pennsylvania Practice 2d - Volume 21, Sections 109:1 - 116:46*; *Standard Pennsylvania Practice 2d - Volume 35, Sections 161:1 - 165:8*; *Summary of Pennsylvania Jurisprudence 2d - Volume 11*; and, *Summary of Pennsylvania Jurisprudence 2d - Volume 11 - 2017-2018 Supplement*.

Scholars examining guardianship law from a social science perspective will find somewhat of a deficiency of material, notably from a psychological context. However, two publications that provided exceptional information and from which I based Part I of my Thesis upon were: *Guardianship of the Elderly - Psychiatric and Judicial Aspects*, authors, George H. Zimny, Ph.D. and George T. Grossberg, M.D.; and, *Older Adults' Decision-Making and the Law*, edited by Michael Smyer, Ph.D., K. Warner Schaie, Ph.D., and Marshall B. Kapp, J.D., MPH.

I hasten to point out that upon performing the research for material related to a guardianship's interrelationship with psychology and/or the social sciences, several publications were initially identified. However, upon closer examination and inspection of these various writings, only those described above were felt to be of true assistance to the format that I provide in my Thesis, *Guardianship of the Elderly – Salient Associated Aspects and the Law of Incapacity in Pennsylvania*.

Former Judicial Studies Program graduate, Judge David Hardy, Ph.D., provided

an interesting law review article entitled, *Who Is Guarding the Guardians? A Localized Call For Improved Guardianship Systems and Monitoring*. Although Judge Hardy's article was primarily concerned with Nevada and Washoe County, in particular, it was enlightening to know that subsequent monitoring of judicially established guardianships is an apparent problem of nationwide concern.

Lastly, three academic articles, *The Aging Brain and Capacity - Misconceptions and Advances*, penned by Brenda K. Uekert, Ph.D; *Judging Capacity in the Elder Population*, also by Brenda K. Uekert, Ph.D.; and *The Role of Counsel For An Alleged Incapacitated Person In Pennsylvania Guardianship Proceedings*, drafted by Lawrence A. Frolik, Esquire, albeit interesting, were not within the breadth of my entitled Thesis.

Obviously, for this type of endeavor, much precedence and reliance is placed on case law. In my Thesis, I have attempted to provide the applicable law in Pennsylvania, not only through the statutes, but as developed by the courts.

The research that I conducted for this paper has failed to disclose any existing literature that collectively discusses the salient associated aspects of guardianship in combination with the law thereof in Pennsylvania. Guardianship law has generally been viewed only from the legal perspective, without allied concern for the psychological or social science effects of a necessitated guardianship upon the ward and his or her family members.

CHAPTER THREE: METHODOLOGY

My methodological approach was to utilize the information gleaned from the previously described materials, as well as from my own personal experience in adjudicating guardianship cases. From this research, I discuss the evolution or reforms that have occurred in the guardianship province. I then continue with an examination of the areas of guardianship law that have a social science foundation.

However, when undertaking the social science portion of this research, I quickly came to the realization that there is a scarcity of available information with regard to guardianship and the social science ramifications thereof. So much so that my original template for this portion of the thesis necessitated revision, as the material that I desired simply was not available. For individuals qualified and desiring to undertake psychological research on the effects of guardianship on the ward, and any of his or her family members, this area may be appropriate for empirical investigation. Notwithstanding this limitation, I located materials associated with guardianship that provided a combined social science and guardianship framework.

The primary focus of my thesis is devoted to the law of guardianship in Pennsylvania. Because guardianship is statutory, information is amply available. As such, the statutes, case law, and treatises are all accessible to allow a researcher to provide an informed integration of the applicable and affiliated law in Pennsylvania.

In an effort to comprehensively consider my research topic, *Guardianship of the Elderly – Salient Associated Aspects and the Law of Incapacity in Pennsylvania*, included are individual chapters covering the following subject areas:

Chapter One: Introduction

- C) Voluntary Surrogate Management Arrangements; and,
- D) Involuntary Surrogate Management Arrangements.

PART ONE - GUARDIANSHIP OF THE ELDERLY – SALIENT ASSOCIATED ASPECTS

Chapter Four: Guardianship and Its Impact on Decision-Making Rights

Chapter Five: Evolution of Guardianship Laws and Trends in Legislative Reform

Chapter Six: Substantive Reforms in Guardianship Laws

Chapter Seven: Reforms in Methods of Assessing Capacity

Chapter Eight: Functional Abilities or Capacities

- G) Domains of Functional Competence;
- H) Components of Decision-Making;
 1. Mental abilities;
 2. Domain-specific knowledge;
 3. Understanding personal circumstances and the interpersonal context;
 4. Attitudes, beliefs, and preferences;
 5. Integration of the decision-making components;
- I) Change in Everyday Problem-Solving Capacity in Old Age;
- J) Mental Disorders and Functional Incompetence: The Causal Link;
- K) Functional Abilities: The Role of the Environmental Context; and,
- L) Forensic Assessment Instruments.

Chapter Nine: Selecting the Guardian

PART TWO – THE LAW OF INCAPACITY IN PENNSYLVANIA

Chapter Ten: Purpose of Proceedings Regarding Incapacitated Persons

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PART THREE - CONCLUSION AND RECOMMENDATIONS

- G) The Appointment of a Visitor to Supplement the Formal Assessment;
- H) More Rigorous Requirements With Regard to Petitions;
- I) Specificity Required in the Court's Findings and Orders;
- J) The Right to Continuing Counsel as Advocate;
- K) Monitoring of Guardianships; and,
- L) A Comprehensive Process is Required.

PART ONE: GUARDIANSHIP OF THE ELDERLY – SALIENT ASSOCIATED ASPECTS

CHAPTER FOUR: GUARDIANSHIP AND ITS IMPACT ON DECISION-MAKING RIGHTS

Every adult person is presumed to be legally competent to make individual choices in life. This presumption may be rebutted, and a substitute decision maker appointed only upon a showing that the individual is mentally unable to take part in a rational decision-making process. A legal finding of incapacity signifies that the person, because of a lack of capacity to contemplate and weigh choices rationally, cannot care adequately for his or her own person or property.¹⁶

Guardianship historically has been a matter of state, as opposed to federal, jurisdiction. Every state has enacted statutes that empower the courts to appoint guardians for judicially adjudicated incapacitated persons.

State guardianship statutes typically contain a two-step definition of incapacity. First, the individual must fall within a specific category, such as old age, mental illness, or developmental disability. Second, the individual must be found to be impaired functionally; that is, unable to care appropriately for his or her person or property, as a result of being within that category. Incapacity cannot be equated with the categorical condition alone, such as advanced years. Consequently, a determination of functional, behavioral, or adaptive disability is also essential.

Judicial appointment of a guardian to make decisions on behalf of a person, who has been adjudicated incapacitated, means that the ward no longer retains the legal power

¹⁶ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 17.

to exercise those decisional rights delegated by the court to the guardian. The legal system has traditionally treated guardianship as an all-or-nothing proposition, with global findings of incapacity accompanied by virtually complete disenfranchisement of the ward. Plenary guardians ordinarily are awarded total authority and power to control the ward's finances, to make decisions about where and with whom the ward will reside, and to grant or withhold authorization for diagnostic or therapeutic interventions.¹⁷

Full or plenary guardianship is one of the most restrictive and oppressive interventions that can be imposed upon an individual, and yet, it has been relatively easy to obtain, particularly with respect to older individuals. "As the term itself indicates, the underlying purpose of guardianship is benevolent: it is intended to assist and protect persons of limited capacity. This is consistent with the beneficent purposes of the *parens patriae* power, which is the power through which the state derives its authority to intervene in the private lives of its citizens and order guardianship over them."¹⁸

Parens patriae power has customarily been exercised in an informal setting without strong procedural protections. This has been accepted on the basis that the purpose of state intervention is to protect the individual's best interest. The focus on protection, and the notion that guardianship was beneficial to the ward, made a judicial determination of incapacitation relatively easy to obtain, especially where the alleged incapacitated individual was of advancing age. Hearings to determine the need for a guardian were informal, non-adversarial, and lacking in procedural protections.

¹⁷ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 18-21.

¹⁸ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 226-227.

Beginning in the 1970's, legal scholars concerned with the independence and autonomy of older persons began to fixate on the consequences to the individual rather than on the purpose of the intervention as was previously the case. Persons determined to be incapacitated, and for whom a guardian is appointed, suffer very serious negative repercussions. A determination of incapacity can, by itself, be degrading, stigmatizing, and may lead to significant deprivation of autonomy, reducing an adult to the legal status of a child. A ward under full guardianship typically retains fewer rights than a convicted felon, and suffers almost total deprivation of personal freedom.¹⁹ Full guardianship removes from the ward "probably the most basic civil liberty of all, the right to make choices about one's life and to determine where one's own interests lie."²⁰ The comprehensive loss of rights accompanying guardianship can mean the loss of all control over personal decisions, unless there is an express requirement by law that the guardian acknowledge and consider the requests of the incapacitated.²¹ "Further, the broad power traditionally granted to guardians carries with it great potential for abuse..."²²

A recent trend has been toward statutory recognition of the concept of limited or partial guardianship. Such a statute acknowledges and encourages judicial deference to the concept of decision-specific mental capacity; that is, the waxing and waning nature of mental capacity for many persons, and the ability of some individuals to rationally make certain kinds of choices, but not others. Some statutes also permit judges to grant guardianship on a temporary, time-limited basis, rather than with an indefinite order that

¹⁹ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 226-227.

²⁰ *Id.* at 227.

²¹ *Id.* at 228.

²² *Id.*

shifts the burden of proof regarding regained capacity onto the ward.

These trends reflect legislative deference to the least restrictive alternative principle concerning state impingement of an individual's rights to personal autonomy. The least restrictive alternative principle is a well-established tenet of American constitutional law, incorporated in the Fourteenth Amendment's due process protections for liberty, and is predicated on the ethical notions of autonomy, non-maleficence, and beneficence. Petitioners are now expected to explore less restrictive or intrusive alternatives to guardianship prior to initiating formal proceedings.

Under limited, partial, or temporary guardianships, courts construct their orders with the least restrictive alternative principle in control, fashioning orders to explicitly delineate the particular and exclusive types of decisions that the ward is incapable of making and over which the guardian may exercise proxy authority, with remaining power residing with the ward. Even in the absence of legislation, state courts have general equity jurisdiction to create limited, partial, or temporary guardianships *sua sponte*, or on their own initiative.²³

CHAPTER FIVE: EVOLUTION OF GUARDIANSHIP LAWS AND TRENDS IN LEGISLATIVE REFORM

Recently, there has been an emerging acknowledgment of the negative aspects of guardianships, and the detrimental consequences thereof, suffered by the incapacitated.²⁴

In response, changes in policy have been implemented to “maximize autonomy and

²³ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 22.

²⁴ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 228.

independence for all older persons, including those of limited capacity.”²⁵ As a result, states have undertaken significant reform in their guardianship statutes aimed at:

[p]reventing unwarranted deprivations of liberty; making available the least restrictive form of intervention, which assists individuals in meeting their needs, but maximizes their potential for self-reliance; tailoring the powers of the guardian to the particular needs of the ward; and, minimizing the potential for abuse of a guardian’s power.²⁶

New statutes generally provide proposed wards with stronger procedural protections and limit the extent of the intervention. Current enactments typically:²⁷

“attempt to decrease the stigma attached to guardianship ...”²⁸

give the proposed ward more meaningful procedural protections, such as the right to timely and adequate notice, the right to counsel whose role is to act as an advocate, the right to be present at hearings, and the right to trial by jury; require stronger evidence that guardianship is warranted by (a) changing the definition of incapacity to focus on functional abilities and disabilities, not on diagnoses or labels, (b) instituting more stringent procedures for assessing capacity which involve more investigators from different disciplines, and require more detailed support of findings, and (c) placing the burden on the petitioner to present ‘clear and convincing’ evidence of the need for guardianship,²⁹

or “proof that a fact is highly probable and free from serious or substantial doubt,”³⁰

including the inadequacy of less restrictive alternatives; state a preference for limited guardianship, and allow the guardian to have power only in those areas where it can be

²⁵ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 228.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 228-229.

³⁰ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 84.

demonstrated that functional disabilities exist; limit the power of even full guardians by enumerating certain basic rights that cannot be lost automatically upon a determination of incapacity; institute steps to prevent abuse and exploitation by guardians, such as (a) requiring greater scrutiny of the person to be appointed guardian (e.g., checking for conflicts of interest, investigating credit and criminal background), (b) requiring guardians to attend guardian education programs, (c) imposing a duty on guardians to involve wards in decisions to the greatest extent possible, and (d) increasing guardian accountability by, for example, requiring more frequent reports to the court and specifying what information must be provided in those reports; and, specify procedures that make terminating a guardianship easier, and require the court to review, at specified times, whether there is continuing need for guardianships that have been imposed.³¹

CHAPTER SIX: SUBSTANTIVE REFORMS IN GUARDIANSHIP LAWS

In undertaking substantive reform, legislatures having altered their guiding philosophies from one of paternalism, as per the *parens patriae* tradition of protecting the “best interests” of the ward, to one of preservation with respect to the individual’s right to decide, even in a situation where one’s choice appears irrational to others.³² “In many of the [reformed] statutes, this is achieved through two substantive changes: (a) new definitions of incapacity, and (b) an explicit preference for limited guardianship.”³³

Reformed statutes use the term “incapacity” rather than “incompetence.”³⁴ “The definition is critical because it provides the framework for guardianship petitions and proceedings, [and] establishes the basic inquiry regarding a person’s need for

³¹ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 229.

³² *Id.* at 230.

³³ *Id.*

³⁴ *Id.*

guardianship.”³⁵

Likewise, definitions have moved away from equating conditions or diagnoses with incapacity, including using “old age” as an activating condition, and have also shifted from employing value judgments as to whether an individual’s actions or decisions are “responsible” or “reasonable.” Such definitions are not satisfactory because diagnoses do not necessarily provide any meaningful indication of a person’s ability to function on a day-to-day basis, and the use of normative standards such as “reasonable decisions” does not promote neutral fact-finding. Thus, these definitions and the use of normative standards may increase the risk that an individual might lose³⁶ “control over decisions governing his or her own life ... for mere idiosyncratic behavior.”³⁷

Current “definitions eliminate the emphasis on conditions and attempt to replace it with objective standards to evaluate the person’s ability to manage personal care or financial affairs on a [daily] basis.”³⁸ They also discourage value judgments as to the “reasonableness” of a person’s behavior and concentrate instead on actual behavior and specific functional abilities to meet essential needs.³⁹ These statutes typically require a two-fold investigation: first, whether the person can understand and appreciate the nature and consequences of his or her inabilities; and second, whether the individual is incapable, without the assistance or protection of a guardian, of meeting essential health, safety, and welfare needs, because of these inabilities and a lack of understanding of a

³⁵ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 230

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

possible negative result.⁴⁰

These definitions have modified guardianship proceedings and provide greater protection against inappropriate findings of incapacity by exacting more rigorous, comprehensive assessments of the individual's ability to function in certain vital ways, and requiring stronger evidence of incapacity to be presented at hearings.

Additionally, as previously discussed, current definitions now provide that, even if a person is found to be incapacitated, guardianship is to be used only to the extent necessary, allowing protected persons to retain as much control over their own decisions as possible. The amended statutes state a strong preference for limited guardianship, in which the guardian is granted only those powers, and only for the period of time necessary, to provide for the demonstrated needs of the ward.⁴¹

Along with being a significant substantive reform that will promote the ward's autonomy, the preference for limited guardianship strengthens the alleged incapacitated person's position in guardianship proceedings by requiring the petitioner to prove specific incapacities and need for assistance.⁴² This necessity will encourage more specific, substantiated assessments of capacity, and the presentation of more compelling evidence at trial.⁴³

⁴⁰ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 230.

⁴¹ *Id.* at 231.

⁴² *Id.* at 232.

⁴³ *Id.*

CHAPTER SEVEN: REFORMS IN METHODS OF ASSESSING CAPACITY

A consequence of the amended definitions and the inclination for limited guardianship is to now modify the focal point and content of assessments of capacity, as well as to who should undertake such assessments.⁴⁴ Previously, physicians or psychiatrists were often the most important witnesses in determining the need for guardianship.⁴⁵ This situation was perhaps due to the terms used in traditional definitions, such as “insanity,” belonging to the arcanum of psychiatry, and it was thus within the purview of the medical profession to identify these conditions.⁴⁶ The major “problem with relying solely on medical opinions is that the information may not be especially useful in evaluating the person’s overall capacity to function”⁴⁷ on a regular basis. Conclusions reached on such basis concerning the need for guardianship, therefore, may not be valid.⁴⁸

It is advocated that interdisciplinary teams or specially trained individuals also perform assessments, and that such individuals base their conclusions on “specific functional criteria.”⁴⁹ Functional evaluations are a method to obtain information on the individual’s ability to “manage essential tasks of daily living, inquiring into such matters as [the] ability to meet basic needs (food, shelter, and clothing), [the] ability to manage financial affairs, and physical and sensory functioning.”⁵⁰ Additional considerations

⁴⁴ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 233.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

should include “the person’s access to helpful resources, such as friends, relatives, transportation, and medical care.”⁵¹

Requiring functional assessments in guardianship proceedings provides courts with more useful evidence of the proposed ward’s capabilities and limitations, and is consistent with amended statutory definitions and the preference for limited guardianship.⁵²

CHAPTER EIGHT: FUNCTIONAL ABILITIES OR CAPACITIES

A) Domains of Functional Competence

A central question in guardianship cases is whether the individual’s level of functional abilities is sufficient for the contextual demands experienced by that elderly individual. Not all older adults are totally incapacitated. Until quite late in a dementing illness, an older adult may retain capacity to perform selected tasks of daily living. In most forms of dementia, or major neurocognitive disorder, cognitive deficits are evident before deficits in basic self-care activities manifest themselves. Moreover, there is some evidence that cognitive functioning declines in a progressive manner, with deficiencies first being exhibited in complex cognitive tasks, such as those involving inductive reasoning or decision-making in novel, unfamiliar situations.⁵³

The two most common domains of functional capacity are: 1) caring for self; and, 2) managing one’s property. In this regard, activities of daily living, ordinarily known as ADLs, focus primarily on self-care, including feeding, bathing, toileting, and basic

⁵¹ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 233.

⁵² *Id.*

⁵³ *Id.* at 91.

mobility, while instrumental activities of daily living, known as IADLs, are viewed as fairly complex, but critical, abilities required in order to live independently in society. Seven IADL activity domains are commonly cited: managing medications, shopping for necessities, managing one's finances, using transportation, using the telephone, maintaining one's household, i.e., housekeeping, and meal preparation and nutrition.

Researchers have argued that it is the IADLs that are of primary interest in guardianship cases. The elderly person may be able to engage in basic self-care activities, and still have serious deficiencies in making decisions associated with independent living, and in managing property. In cases where the individual is lacking in these most basic self-care functions, ADLs, the deficiencies are often sufficiently obvious and serious that institutionalization is required.⁵⁴

B) Components of Decision-Making

Research on decision-making and problem solving becomes of interest, given the increasingly important role in legal judgments that are ascribed to the capacity of the elderly to make decisions. At least five components are involved in making decisions related to tasks of daily living. There is a hierarchical relationship among the components in this framework. Basic mental abilities and domain-specific knowledge bases are necessary components in decision-making, but alone are not sufficient for adequate problem solving; there must also be consideration of the elderly's perception of the social and physical environment associated with the problem or task, and the individual's beliefs and preferences regarding alternative solutions.

⁵⁴ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 92.

1) Mental abilities

Many of the basic abilities, e.g., verbal, reasoning, and memory, are required in solving tasks associated with daily living. However, some tasks of daily living are often very complex, and involve more than one mental ability. Different constellations of mental abilities and processes will be required for various practical problems.

2) Domain-specific knowledge

Decision-making also involves specialized knowledge related to the problem at hand. Research literature on expertise has shown some relationship between a single, specialized knowledge domain and competence in a skill or profession. Solutions for many everyday types of tasks will likely require accessing several different knowledge domains.

3) Understanding personal circumstances and the interpersonal context

Considered here are the more individualized, personal, affective, and social dimensions of everyday decision-making in which individuals take into account their own personal circumstances and contexts.

4) Attitudes, beliefs, and preferences

Understanding and assessing one's personal circumstances reflects in part certain attitudes, beliefs, and preferences. Locus-of-control beliefs involve whether an individual perceives control over one's life to lie primarily under one's own control or whether control is external, determined largely by fate or powerful others, e.g., doctors and lawyers. Likewise, self-efficacy beliefs reflect one's opinions regarding his or her own capacity. Research on age-related changes in self-efficacy indicates an increased dependence on powerful others in old age. Some elderly persons may therefore

increasingly seek and depend on the advice of significant others, such as, doctors, lawyers, ministers, and adult children, in making important decisions in everyday life.⁵⁵ Studies indicate the supposition that one needs to depend on “powerful others in making decisions increases with age.”⁵⁶ It is important that clinicians and legal professionals involved in assessing capacity, and in making judgments regarding the need for guardianship, are aware of these age-related belief systems.

5) Integration of decision-making components

Reaching an effective solution involves integration of the above dimensions. Integration continually occurs at various phases of the problem-solving process. Integration of the multiple components in the decision process and articulation of the rationale for the decision reached may involve several steps including, identification of solution alternatives, ruling out options that will not work given the individual’s personal circumstances, and prioritizing the remaining viable options.⁵⁷

C) Change in Everyday Problem-Solving Capacity in Old Age

Those involved in guardianship cases need an understanding of the normative age-related changes in capacity to make everyday decisions that occur for elderly persons with no known pathologies.

Research data suggests that the educationally disadvantaged elderly are increasingly likely to need assistance in everyday decision-making, even though they do

⁵⁵ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 94-97.

⁵⁶ *Id.* at 97.

⁵⁷ *Id.*

not suffer from a specific mental disorder.⁵⁸

There are personal characteristics of adults that make them particularly vulnerable to functioning at lower levels of capacity as they age. Education is significantly related to the level of everyday capacity. Adults with lower levels of education have greater difficulty, on average, in daily decision-making throughout their adult lives. These less educated adults become more affected in old age when their level of functioning is even further diminished by age-related changes in performance.⁵⁹

D) Mental Disorders and Functional Incompetence: The Causal Link

Until recently, most states' statutes regarding incapacity equated incapacity with a mental disease or disorder. An affidavit signed by a physician was sufficient for determination of incapacity. Subsequent to statutory amendment, the simple diagnosis of a mental disorder is no longer sufficient support for a judgment of incapacity. The critical criterion is evidence of functional impairment in domains considered essential for care of self and property. Customarily, a mental disorder must still be identified, but the emphasis is on demonstrating that the disorder offers a causal explanation for the functional deficit observed. The functional deficit must be the product of some underlying disability condition over which the adult currently has no control. If the functional deficiency can be remediated or modified there may be no need for a guardianship, or a guardian may need to be appointed for a limited amount of time as is necessary for correction of the precipitating condition. Causal inference involves a demonstration that the functional deficit can be logically related to a specific underlying

⁵⁸ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 97-99.

⁵⁹ *Id.* at 99.

disorder, and supporting evidence that can eliminate other possible explanations.⁶⁰

E) Functional Abilities: The Role of the Environmental Context

The elderly do not live in a vacuum, and thus, capacity cannot be considered without taking into consideration the environment in which they function. The environmental context is critical in defining which specific functional abilities are most pertinent in legal capacity judgments. The term “environmental context” refers to the external situations to which the older adult must respond. Different contexts require different functional abilities. The legal system cannot assess functional abilities without taking into consideration the environmental context in which these abilities are required.

Gerontological literature has defined the social-cultural context to include both the physical and the social environment in which the individual must function competently in order to maintain independence. The physical environment includes factors such as geographical location, climate, and architectural features of facilities; characteristics of the physical environment influence the types of tasks required to function independently in that context. Functional abilities associated with independent living would be expected to vary whether the older adult lives in an urban or rural environment or in the inner city or suburbia.

Likewise, the social environment is critically important in determining social roles and the functional abilities associated with these roles. For example, several of the IADL domains, e.g., housekeeping, meal preparation, and shopping, traditionally ascribed to women, should be considered in context when making a judicial

⁶⁰ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 100-101.

determination of capacity as it relates to the IADLs of an alleged incapacitated male, where such an individual did not previously undertake these duties.

The socio-cultural context is dynamic and ever changing; hence, the requisite functional abilities would be expected to change with the historical context. Use of computers has become pervasive; the interest of an older adult in computer-driven technologies must be taken into consideration when making such an evaluation.⁶¹

F) Forensic Assessment Instruments

The use of Forensic Assessment Instruments, FAIs, is common in assessment of older adults involved in guardianship cases. FAIs have increased in use as a result of the emphasis on deficits in functional abilities as the primary criteria for judgments of incapacity, and the rejection of a mental disorder diagnosis as a sufficient justification for guardianship rulings.⁶² A forensic assessment instrument has been described as “an operational definition of a legally relevant functional ability concept.”⁶³ FAIs are intended to provide data that can manage the conceptual gap between legal constructs and psychological constructs.

Two major categories of measures to assess functional abilities in the elderly are typically utilized. The most common type of measure is a self-report instrument.

Second, is an objective assessment of the individual’s functional abilities.

In a self-report instrument, the older adult is asked to rate his or her level of competence on each of the IADL domains. Comparisons of those individuals 60-74

⁶¹ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 104-105.

⁶² *Id.* at 108.

⁶³ *Id.*

years of age with those of 75 and older indicate a smaller proportion of these persons 75 and older capable of functioning independently in each of the domains.

Objective measures of functional ability involve presenting the elderly adult with specific tasks of daily living, e.g., telling time, counting change, addressing an envelope, determining medication information from a prescription drug label, and/or ascertaining the amount to be paid from a telephone bill. The adult's response to the tasks is assessed objectively by having the individual verbally indicate the solution to the task, or observing the adult's behavioral response. Objective measures of functional ability tend to focus on higher order, more complex tasks of daily living. In conjunction, both of these FAIs provide vital information to assess an older adult's capacity to reside independently.⁶⁴

CHAPTER NINE: SELECTING THE GUARDIAN

Most contested guardianship cases do not involve the issue of whether a guardianship should be established, but rather who should be the guardian. The first preference is the person nominated in writing by the proposed ward while he or she had capacity.

In cases where there are competing nominated guardians, it is rare that one is acting solely in the best interests of the ward, and the other is acting exclusively in self-interest. It is rarer still to find two competing nominated guardians who are both acting solely in the best interests of the proposed ward. It is common to have the competing nominated guardians both acting entirely in their own self-interest, but the most common

⁶⁴ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 108-120.

contested case involves competing nominated guardians who are acting in a combination of the best interests of the ward and in self-interest.

A judge's decision in a case may turn on such a factor as the plans the competing nominated guardians have for the ward's care. The judge must evaluate the prospective plans and determine which would be of greater overall benefit to the ward.

In making a decision, a judge may also have to discern any other possible motives of the nominees, and consider the possibility that a nominee will inherit after the death of the ward. The judge must weigh the interests of the ward against those of the nominee. Consideration should likewise be given to whether the nominee is likely to spend unwisely, in order to unnecessarily deplete the estate of the ward so that another person will inherit little upon the ward's death. The judge must decide in the ward's interest, and any residual benefit to another person is collateral.

In a contest between competing nominees, the judge often must also discern the motives behind the facts. No nominee may be perfect, or even desirable, and each may offer positive and negative features to consider. Sometimes a judge's decision in selecting a guardian becomes a question of which nominee is the lesser of two evils. In such situations, when considering the best interests of the ward, a judge may order the appointment of an independent and disinterested third party. The quality of life of the ward may depend on the individual selected by the court to act on said ward's behalf.⁶⁵

⁶⁵ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 97-99.

PART TWO: THE LAW OF INCAPACITY IN PENNSYLVANIA

CHAPTER TEN: PURPOSE OF PROCEEDINGS REGARDING INCAPACITATED PERSONS

The power to act and/or make decisions on behalf of individuals whose mental condition is such that they are unable to competently handle their assets or personal needs is a very important authority, one that is easily capable of abuse by designing relatives or others, and is, at times, used to achieve the very wrong sought to be guarded against.⁶⁶ As such, courts have required that these powers be administered with the utmost caution and conservatism.⁶⁷

Provisions governing guardianships for incapacitated individuals recognize that every person “has unique needs and differing abilities.”⁶⁸ The purpose of proceedings with respect to incapacitated persons is to establish a system that permits such individuals “to participate as fully as possible in all decisions which affect them, which assists these persons in meeting the essential requirements for their physical health and safety, protecting their rights, managing their financial resources and developing or regaining their abilities to the maximum extent possible and which accomplishes these objectives through the use of the least restrictive alternative...”⁶⁹ A court may however, “dismiss a [guardianship] proceeding where it determines that the proceeding has not been instituted to aid or benefit the alleged incapacitated person...”⁷⁰

⁶⁶ *In Re: Estate of Wood*, 368 Pa. Super. 173, 533 A.2d 772 (1987).

⁶⁷ *In Re: Ryman*, 139 Pa. Super. 211, 11 A.2d 677 (1940).

⁶⁸ 20 Pa.C.S.A. §5502.

⁶⁹ *Id.*

⁷⁰ 20 Pa.C.S.A. §5511(a).

CHAPTER ELEVEN: DEFINITION OF INCAPACITATED PERSON

An incapacitated person is “an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.”⁷¹ An individual under the age of majority cannot be declared incapacitated. The proper practice for a minor suffering from a mental illness is to have a guardian appointed for his or her estate as a minor, and upon then attaining majority, the guardian may be discharged and proceedings may be instituted to have said individual adjudged an incapacitated person and a guardian appointed should the need still exist.⁷²

A person cannot be deemed to be incapacitated if his or her impairment is counterbalanced by friends, family or other support systems.⁷³

CHAPTER TWELVE: EVIDENCE NECESSARY TO ESTABLISH INCAPACITY

In order to establish an individual as incapacitated, the petitioner must present testimony “from individuals qualified by training and experience in evaluating individuals with incapacities of the type alleged by the petitioner, which establishes the nature and extent of the alleged incapacities and disabilities...” as well as, the alleged incapacitated “person’s mental, emotional and physical condition, adaptive behavior and social skills.”⁷⁴ Evidence of the statements, acts, and conduct of the alleged incapacitated

⁷¹ 20 Pa.C.S.A. §5501.

⁷² *In Re: Williams Estate*, 40 Pa. D. & C.2d 718 (C.P. 1966).

⁷³ *In Re: Peery*, 556 Pa. 125, 727 A.2d 539 (1999).

⁷⁴ 20 Pa.C.S.A. §5518.

person is relevant to the person's mental condition,⁷⁵ and there is authority that one's mental capacity is best determined by their spoken words, acts and conduct.⁷⁶ Due weight must be given however, to the testimony of physicians and psychiatric experts.⁷⁷ Additionally, the court's opportunity to observe the credibility of the witnesses is entitled to great weight.⁷⁸ An individual's mental capacity is presumed,⁷⁹ and "[n]o presumption of incapacity [can] be raised from the alleged incapacitated person's institutionalization."⁸⁰

CHAPTER THIRTEEN: EFFECT OF AN ADJUDICATION OF INCAPACITY

The determination of incapacity is prospective only,⁸¹ and the court has no power to determine how long a person has been incapacitated, or to make rulings regarding the disposition of property made prior to the court's decree relative to incapacity.⁸² Contracts and other instruments made with an incapacitated person prior to their adjudication as incapacitated are voidable upon a showing that such person was, in fact, incapacitated at the time the instrument was entered into.⁸³ Thus, an adjudication of incapacity raises a presumption, subject to rebuttal by the proponent of the instrument in question, to show that at the time of its execution the maker was in fact capable;⁸⁴ however, all transactions

⁷⁵ *In Re: Owens' Estate*, 167 Pa. Super. 10, 74 A.2d 705 (1950).

⁷⁶ *In Re: Urquhart's Estate*, 431 Pa. 134, 245 A.2d 141 (1968).

⁷⁷ *In Re: Porter*, 63 Pa. D. & C. 134 (C.P. 1948).

⁷⁸ *Matter of Caine*, 490 Pa. 24, 415 A.2d 13 (1980).

⁷⁹ *In Re: Myers' Estate*, 395 A.2d 459, 150 A.2d 525 (1959).

⁸⁰ 20 Pa.C.S.A. §5512.1(f).

⁸¹ *In Re: Hastings' Estate*, 479 Pa. 122, 387 A.2d 865 (1978).

⁸² *In Re: Myers' Estate*, 395 A.2d 459, 150 A.2d 525 (1959).

⁸³ *Weir by Gasper v. Estate of Ciao*, 521 Pa. 491, 556 A.2d 819 (1989).

⁸⁴ *In Re: Appointment of a Guardian of Gerber*, 2003 Pa. Super. 196, 824 A.2d 1204 (2003).

occurring after an adjudication of incapacity are presumptively invalid.⁸⁵ A decree establishing incapacity does

...not impair the interest in real estate acquired by a bona fide grantee of, or a bona fide holder of a lien on, real estate in a county other than that in which the decree establishing the incapacity is entered, unless the decree or a duplicate original or a certified copy thereof is recorded in the office of the recorder of deeds in the county in which the real estate lies before the recording or entering of the instrument or lien under which the grantee or lienholder claims.⁸⁶

However, an incapacitated person cannot confess judgment, and a decree of incapacity provides a basis to strike off a judgment confessed by an incapacitated person subsequent to a declaration of incapacity,⁸⁷ but an individual previously adjudicated as incapacitated may be competent to testify.⁸⁸

In the event that the court finds a person to be partially incapacitated, the authority of the guardian appointed must be limited to powers consistent with the court's determination as to the person's limitations.⁸⁹ "A partially incapacitated person shall be incapable of making any contract or gift or any instrument in writing in those specific areas in which the person has been found to be incapacitated."⁹⁰ A partially incapacitated person retains however all legal rights, "[e]xcept in those areas designated by court order as areas over which the limited guardian has power ..."⁹¹

⁸⁵ *In Re: Carver's Estate*, 5 Pa. D. & C.3d 743 (C.P. 1977).

⁸⁶ 20 Pa.C.S.A. §5524.

⁸⁷ *Century Credit Co. v. Jones*, 196 Pa. Super. 210, 173 A.2d 768 (1961).

⁸⁸ *Syno v. Syno*, 406 Pa. Super. 218, 594 A.2d 307 (1991).

⁸⁹ 20 Pa.C.S.A. §5512.1(b).

⁹⁰ 20 Pa.C.S.A. §5524.

⁹¹ 20 Pa.C.S.A. §5512.1(g).

A totally incapacitated person is “incapable of making any contract or gift or any instrument in writing.”⁹² A court “may appoint a plenary guardian of the person only upon a finding that the person is totally incapacitated and in need of plenary guardianship services.”⁹³ A “court may appoint a plenary guardian of the estate only upon a finding that the person is totally incapacitated and in need of plenary guardianship services.”⁹⁴

CHAPTER FOURTEEN: JURISDICTION

The court exercising jurisdiction through its Orphans’ Court “upon petition and hearing and upon the presentation of clear and convincing evidence, may find a person domiciled in the Commonwealth to be incapacitated and appoint a guardian or guardians of his person or estate.”⁹⁵ A person not domiciled in the Commonwealth but who owns property in Pennsylvania may be found to be incapacitated after the requisite filing of a petition and hearing thereon or “upon the submission of an exemplified copy of a decree establishing his incapacity in another jurisdiction.”⁹⁶

Once an individual has been adjudicated incapacitated, the court must appoint a guardian for such individual, granting limited or plenary powers consistent with the incapacitated person’s needs.⁹⁷ “When a court has appointed a guardian of the person or estate...no other court shall appoint a similar guardian for the incapacitated person within”⁹⁸ Pennsylvania.

⁹² 20 Pa.C.S.A. §5524.

⁹³ 20 Pa.C.S.A. §5512.1(c).

⁹⁴ 20 Pa.C.S.A. §5512.1(e).

⁹⁵ 20 Pa.C.S.A. §5511(a).

⁹⁶ 20 Pa.C.S.A. §5511(b).

⁹⁷ *Estate of Haertsch*, 437 Pa. Super. 187, 649 A.2d 719 (1994).

⁹⁸ 20 Pa.C.S.A. §5512(c).

A guardian of the person or estate of an incapacitated person who is a domiciliary of Pennsylvania “may be appointed by the court of the county in which the incapacitated person is domiciled, is a resident or is residing in a long-term care facility.”⁹⁹ A guardian of the estate of an incapacitated person domiciled outside of Pennsylvania “may be appointed by the court of the judicial district having jurisdiction of a decedent’s estate or of a trust in which the incapacitated person has an interest,” or when the estate is derived otherwise, “by the court of any county where an asset of the incapacitated person is located.”¹⁰⁰ “At the conclusion of a proceeding [where] the person has been adjudicated incapacitated, the court [must] assure that the person is informed of his [or her] right to appeal and to petition to modify or terminate the guardianship.”¹⁰¹

Initially, jurisdiction of the person may only be obtained by a citation issued from the court upon application of any party in interest.¹⁰² In order for the court to acquire personal jurisdiction over an alleged incapacitated person, this individual must be served with the citation prior to the hearing, and any decree adjudicating incapacity and appointing a guardian is invalid where no citation was issued and served upon the incapacitated person prior to the hearing.¹⁰³ Because the requirement of a citation is the mandated original process for obtaining jurisdiction over the person, such that it is substantive and not merely procedural, it is not satisfied simply with notice of the hearing to the alleged incapacitated person.¹⁰⁴

⁹⁹ 20 Pa.C.S.A. §5512(a).

¹⁰⁰ 20 Pa.C.S.A. §5512(b).

¹⁰¹ 20 Pa.C.S.A. §5512.1(h).

¹⁰² 20 Pa.C.S.A. §764.

¹⁰³ *In Re: Rosini’s Estate*, 426 Pa. 220, 232 A.2d 191 (1967).

¹⁰⁴ *In Re: Hicks’ Estate*, 414 Pa. 131, 199 A.2d 283 (1964).

A petitioner must “notify the court at least seven days prior to the hearing if counsel has not been retained by or on behalf of the alleged incapacitated person” and “counsel shall be appointed to represent the alleged incapacitated person in any matter for which counsel has not been retained by or on behalf of that individual.”¹⁰⁵

CHAPTER FIFTEEN: ISSUES ASSOCIATED WITH THE PETITION

Any person interested in the welfare of the alleged incapacitated person may file a petition with the court requesting a finding of incapacity, and the appointment of a guardian on behalf of such person and/or his or her estate.¹⁰⁶ In this regard, it has been held that an attorney may file a petition to have their client adjudicated incapacitated and a guardian appointed to protect the client’s interests,¹⁰⁷ and the Commonwealth is also a proper petitioner where the alleged incapacitated person is a resident of a state operated facility for the mentally disabled.¹⁰⁸

A petition to adjudicate a person as incapacitated and to have a guardian appointed for his or her person and/or estate must be in plain language and must set forth the name, age and residence

...of the alleged incapacitated person, the names and addresses of the spouse, parents and presumptive adult heirs of the alleged incapacitated person, the name and address of the person or institution providing residential services to the alleged incapacitated person, the names and addresses of other service providers, the name and address of the person or entity whom the petitioner asks to be appointed guardian, an averment that the proposed guardian has no interest adverse to the alleged incapacitated person,

¹⁰⁵ 20 Pa.C.S.A. §5511(a).

¹⁰⁶ *Id.*

¹⁰⁷ *In Re: Riley’s Estate*, 11 Pa. D. & C.2d 399 (C.P. 1958)

¹⁰⁸ *Matter of Caine*, 490 Pa. 24, 415 A.2d 13 (1980).

the reasons why guardianship is sought, a description of the functional limitations and physical and mental condition of the alleged incapacitated person, the steps taken to find less restrictive alternatives, the specific areas of incapacity over which it is requested that the guardian be assigned powers and the qualifications of the proposed guardian. If a limited or plenary guardian of the estate is sought, the petition shall also include the gross value of the estate and net income from all sources to the extent known.¹⁰⁹

In the petition, the petitioner must provide evidence “regarding the services being utilized to meet essential requirements for the alleged incapacitated person’s physical health and safety, to manage the person’s financial resources, to develop or regain the person’s abilities...”¹¹⁰ This evidence is to include “the types of assistance required by the person,”¹¹¹ as well as an explanation “as to why no less restrictive alternatives would be appropriate.”¹¹² Evidence must also be proffered regarding “the probability that the extent of the person’s incapacities may significantly lessen or change.”¹¹³

“Written notice of the petition and hearing shall be given in large type and in simple language to the alleged incapacitated person.”¹¹⁴ The notice must “indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding.”¹¹⁵ It must also “include the date, time and place of the hearing and an explanation of all rights, including the right to request the appointment of counsel and to

¹⁰⁹ 20 Pa.C.S.A. §5511(e).

¹¹⁰ 20 Pa.C.S.A. §5518.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 20 Pa.C.S.A. §5511(a).

¹¹⁵ *Id.*

have counsel appointed if the court deems it appropriate and the right to have such counsel paid for if it cannot be afforded.”¹¹⁶

Personal service of the notice must “be made on the alleged incapacitated person, and the contents and terms of the petition [must] be explained to the maximum extent possible in language and terms the individual is most likely to understand.”¹¹⁷ Service is to be made “no less than 20 days in advance of the hearing.”¹¹⁸ Similarly:

notice of the petition and hearing [must] be given in such manner as the court shall direct to all persons residing within the Commonwealth who are sui juris and would be entitled to share in the estate of the alleged incapacitated person if [such person were to die] intestate at that time, to the person or institution providing residential services to the alleged incapacitated person, and to such other parties as the court may direct, including other service providers.¹¹⁹

For a non-domiciliary to be found incapacitated and a guardian appointed for such person’s estate, written notice of the filing of the petition and hearing thereon is to be provided in the same manner as with a domiciliary unless such a proceeding is dispensed with by the submission of an exemplified copy of a decree establishing his or her incapacity in another jurisdiction.¹²⁰

¹¹⁶ 20 Pa.C.S.A. §5511(a).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 20 Pa.C.S.A. §5511(b).

CHAPTER SIXTEEN: THE HEARING AND A FINDING OF INCAPACITY

In order to find a Pennsylvania domiciliary to be incapacitated and a guardian or guardians appointed for his or her person and/or estate, a hearing must be held. This hearing may take place at the residence of the alleged incapacitated person.¹²¹

The alleged incapacitated person must be present at the hearing unless:

- (1) the court is satisfied, upon the deposition or testimony of or sworn statement by a physician or licensed psychologist, that the [person's] physical or mental condition would be harmed by his [or her] presence; or,
- (2) it is impossible for [such person] to be present because of his [or her] absence from the Commonwealth...¹²²

If the alleged incapacitated person is not present for the hearing, he or she need not be represented by a guardian ad litem in the proceeding.¹²³ “The hearing may be closed to the public and without a jury unless the alleged incapacitated person or his counsel objects.”¹²⁴ If requested, the hearing must be closed and proceed with or without a jury as per the request.¹²⁵ An independent evaluation of the alleged incapacitated person may be ordered upon the court's own motion or upon petition by the individual, with due consideration being given “to the appointment of an evaluator nominated by the alleged

¹²¹ 20 Pa.C.S.A. §5511(a).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

incapacitated person.”¹²⁶ Should the “alleged incapacitated person [be] unable to pay for counsel or for the evaluation, the court [must] order the county to pay these costs...”¹²⁷

Specific findings of fact concerning the nature and extent of the incapacity of the person must be made by the court relative to the following: “(1) The nature of any condition or disability which impairs the individual’s capacity to make and communicate decisions.”¹²⁸ “(2) The extent of the individual’s capacity to make and communicate decisions.”¹²⁹ “(3) The need for guardianship services, if any, in light of such factors as the availability of family, friends and other supports to assist the individual in making decisions and in light of the existence, if any, of advance directives, such as durable powers of attorney or trusts.”¹³⁰ “(4) The type of guardian, limited or plenary, of the person or estate needed based on the nature of any condition or disability and the capacity to make and communicate decisions.”¹³¹ “(5) The duration of the guardianship.”¹³² “(6) The court shall prefer limited guardianships.”¹³³

A plenary guardian of the person may be appointed by the court “only upon a finding that the person is totally incapacitated and in need of plenary guardianship services.”¹³⁴ The “court may appoint a plenary guardian of the estate only upon a finding that the person is totally incapacitated and in need of plenary guardianship services.”¹³⁵

¹²⁶ 20 Pa.C.S.A. §5511(d).

¹²⁷ 20 Pa.C.S.A. §5511(c).

¹²⁸ 20 Pa.C.S.A. §5512.1(a)(1).

¹²⁹ 20 Pa.C.S.A. §5512.1(a)(2).

¹³⁰ 20 Pa.C.S.A. §5512.1(a)(3).

¹³¹ 20 Pa.C.S.A. §5512.1(a)(4).

¹³² 20 Pa.C.S.A. §5512.1(a)(5).

¹³³ 20 Pa.C.S.A. §5512.1(a)(6).

¹³⁴ 20 Pa.C.S.A. §5512.1(c).

¹³⁵ 20 Pa.C.S.A. §5512.1(e).

Upon petition and a hearing where clear and convincing evidence establishes an imminent need, the court may appoint an emergency guardian or guardians of the person and/or estate of the individual alleged to be incapacitated. It must appear that the person lacks capacity, is in need of a guardian, and that a failure to make such an appointment will result in irreparable harm to the person or to the estate of the alleged incapacitated individual.¹³⁶ The provisions relating to full guardianship proceedings are applicable to the appointment of an emergency guardian or guardians except when the court finds that it is not feasible under the circumstances.¹³⁷

An emergency guardian appointed for the person and/or estate of an alleged incapacitated person has only those powers, duties and liabilities as the court directs in the decree.¹³⁸ An emergency order appointing an emergency guardian of the person may be in effect for up to seventy-two hours, should the emergency continue, it may be extended for no more than twenty days from the expiration of the initial emergency order. Upon the expiration of the emergency order or any extension thereof, a full guardianship proceeding must be initiated.¹³⁹ An order appointing an emergency guardian of the estate may not exceed thirty days, after which a full guardianship proceeding must be instituted.¹⁴⁰ The court may also appoint an emergency guardian of “an alleged incapacitated person who is present in this Commonwealth but is domiciled outside of

¹³⁶ 20 Pa.C.S.A. §5513.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

this Commonwealth, regardless of whether the alleged incapacitated person has property in this Commonwealth.”¹⁴¹

CHAPTER SEVENTEEN: APPOINTMENT OF A GUARDIAN

A court may appoint any of the following as guardian: “any qualified individual, a corporate fiduciary, a nonprofit corporation, a guardianship support agency ... or a county agency.”¹⁴² As it relates to residents of state facilities, the court may also appoint as a guardian of said individual’s estate, the guardian office at the state facility.¹⁴³ In any event, the court must give preference to the nominee of the incapacitated person,¹⁴⁴ subject to a determination by the court as to what is in the best interests of the incapacitated person.¹⁴⁵ If the incapacitated person had previously nominated by durable power of attorney a guardian of his or her estate, the court should make its appointment in accordance with the most recent nomination except for good cause shown or disqualification.¹⁴⁶

The appointment of a guardian lies within the discretion of the trial court and will be overturned only upon an abuse of discretion.¹⁴⁷ Suggestions of the parties to the proceedings as to the appointment of a particular guardian for the estate of an incapacitated person are to be considered by the court; however, the court is not obligated to confine its ultimate selection of a guardian to any of those recommended by the

¹⁴¹ 20 Pa.C.S.A. §5513.

¹⁴² 20 Pa.C.S.A. §5511(f).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *In Re: Duran*, 769 A.2d 497 (Pa. Super. 2001).

¹⁴⁶ *In Re: Sylvester*, 409 Pa. Super. 439, 598 A.2d 76 (1991).

¹⁴⁷ *In Re: Heidtman’s Estate*, 452 Pa. 441, 306 A.2d 878 (1973).

parties.¹⁴⁸ Preference is to be given by the court in its appointment of a guardian for the estate of a non-domiciliary to the foreign guardian previously appointed on behalf of the incapacitated person, unless it finds that such appointment will not be in the best interests of the individual.¹⁴⁹

A court should not appoint a guardian with an interest adverse to the interests of the incapacitated person¹⁵⁰ and it “shall not appoint a person or entity providing residential services for a fee to the incapacitated person or any other person whose interests conflict with those of the incapacitated person except where it is clearly demonstrated that no guardianship support agency or other alternative exists.”¹⁵¹ Any family relationship to the incapacitated person is not, by itself, considered an adverse interest.¹⁵² Therefore, one spouse is not prohibited from appointment as the other spouse’s guardian solely by virtue of the marital relationship, on the grounds of having an adverse interest to the spouse in need of guardianship services.¹⁵³

CHAPTER EIGHTEEN: ISSUES RELATING TO BOND

Generally, the guardian of an estate of an incapacitated person must execute and file a bond naming “the Commonwealth, with sufficient surety, in such amount as the court considers necessary...”¹⁵⁴ taking into consideration the value of the personal estate

¹⁴⁸ *In Re: Voshake’s Guardianship*, 125 Pa. Super. 98, 189 A.2d 753 (1937).

¹⁴⁹ 20 Pa.C.S.A. §5511(b).

¹⁵⁰ *In Re: Estate of Dorone*, 349 Pa. Super. 59, 502 A.2d 1271 (1985), order aff’d, 517 Pa. 3, 534 A.2d 452 (1987).

¹⁵¹ 20 Pa.C.S.A. §5511(f).

¹⁵² *Id.*

¹⁵³ *In Re: Heidtman’s Estate*, 452 Pa. 441, 306 A.2d 878 (1973).

¹⁵⁴ 20 Pa.C.S.A. §5121, 5515.

that will come into the guardian's control.¹⁵⁵ No bond is required however, under the following circumstances: (1) when the guardian is appointed by or in accordance with the terms of a will, inter vivos instrument or insurance contract relative to the property acquired under such document, unless it is required by the conveyance or the court deems it advisable;¹⁵⁶ (2) when the guardian is a bank and trust company or a trust company incorporated in Pennsylvania or a national bank having its principal office in the Commonwealth, unless the court deems it advisable;¹⁵⁷ (3) when the court finds within its discretion to excuse a nonresident corporation or a national bank having its principal office outside of Pennsylvania from giving bond;¹⁵⁸ or, (4) when the court finds that no bond is necessary.¹⁵⁹ The court may, at any time for cause shown, require the posting of a surety bond, or may increase or decrease the amount of an existing bond, or require more or less security therefore.¹⁶⁰

When the incapacitated person is a fiduciary of an estate, the court may, in addition to any bond mandated for the incapacitated person's individual estate, require a separate bond naming the Commonwealth, with sufficient surety and in an amount as the court deems necessary for the protection of the parties in interest in the estate of which the incapacitated person is serving as a fiduciary.¹⁶¹

¹⁵⁵ 20 Pa.C.S.A. §§5121, 5515.

¹⁵⁶ 20 Pa.C.S.A. §§5122(a), 5515.

¹⁵⁷ 20 Pa.C.S.A. §§5122(b), 5515.

¹⁵⁸ 20 Pa.C.S.A. §§5122(c), 5515.

¹⁵⁹ 20 Pa.C.S.A. §§5122(d), 5515.

¹⁶⁰ 20 Pa.C.S.A. §§5123, 5515.

¹⁶¹ 20 Pa.C.S.A. §5516.

CHAPTER NINETEEN: REVIEW HEARINGS

A court may hold a review hearing at any time and must promptly conduct such a hearing if the incapacitated person, guardian, or any interested party petitions therefore based upon a significant change in the person's capacity, a change in the need for guardianship services, or upon the guardian's failure to perform their duties according to the law, or to act in the best interest of the incapacitated person.¹⁶² The burden of proof in such hearings is by clear and convincing evidence, and is placed upon "the party advocating continuation of [the] guardianship or [an] expansion of areas of incapacity."¹⁶³

After a review hearing, the court may order that the person previously declared incapacitated is no longer so, based upon a fair preponderance of the evidence,¹⁶⁴ or "find that the incapacitated person has regained or lost capacity in certain areas, in which case the court [must] modify the existing guardianship order."¹⁶⁵ A court's determination of whether a person previously adjudicated incapacitated is now capacitated lies within the sound discretion of the court and is subject to an abuse of discretion standard for review purposes.¹⁶⁶

On its own motion, or on the petition of any party in interest alleging sufficient grounds, the court may order the guardian "to appear and show cause why he [or she] should not be removed, or, when necessary to protect the rights of creditors or other

¹⁶² 20 Pa.C.S.A. §5512.2(a).

¹⁶³ 20 Pa.C.S.A. §5512.2(b).

¹⁶⁴ *In Re: Nagle's Estate*, 418 Pa. 170, 210 A.2d 262 (1965).

¹⁶⁵ 20 Pa.C.S.A. §5517.

¹⁶⁶ *In Re: Nagle's Estate*, 418 Pa. 170, 210 A.2d 262 (1965).

parties in interest, may summarily remove [the guardian].”¹⁶⁷ A guardian may be removed by the court when: (1) they are wasting or mismanaging the estate, the estate is likely to become insolvent, or the guardian failed to perform any duty imposed by law; (2) the guardian has become incapacitated to discharge the duties of their office because of sickness or physical or mental incapacity and the incapacity is likely to continue so as to injure the estate; (3) the guardian has left the Commonwealth or has ceased to have a known residence therein, without providing such security or additional security as directed by the court; (4) the guardian has been charged with voluntary manslaughter or homicide, except homicide by vehicle; however, removal shall not occur if the charges have been dismissed, withdrawn or a finding of not guilty has been entered; or, (5) when, for any other reason, the interests of the estate are likely to be jeopardized by the guardian remaining in office.¹⁶⁸

A subsequent determination that a person previously adjudged incapacitated has now become capacitated is grounds for removal of the guardian,¹⁶⁹ but a court may refuse to remove a guardian if it appears that the mind of the incapacitated person is so affected that they are liable to dissipate or lose their property or become the victim of designing persons.¹⁷⁰ Conversely, a guardianship may not be continued merely because the person lacks the ability or experience necessary to manage large sums of money.¹⁷¹

A guardian may also be discharged by the court from future liability after confirmation of their final account and distribution of the assets to the parties entitled

¹⁶⁷ 20 Pa.C.S.A. §§3183, 5515.

¹⁶⁸ 20 Pa.C.S.A. §§3182, 5515.

¹⁶⁹ *In Re: Card*, 177 Pa. Super. 502, 110 A.2d 856 (1955).

¹⁷⁰ *In Re: Earnshaw*, 187 Pa. Super. 124, 144 A.2d 480 (1958).

¹⁷¹ *In Re: Porter's Estate*, 463 Pa. 411, 345 A.2d 171 (1975).

thereto. Additionally, a “court may discharge only the surety from future liability, allowing the [guardian] to continue without surety, upon condition that no further assets shall come into the control of the [guardian] until he [or she] files another bond with sufficient surety, as required by the register.”¹⁷²

Removal of a fiduciary is a drastic action and should only be taken when the estate is endangered and intervention is necessary to protect the property of the estate.¹⁷³ However, upon a failure to post bond as required¹⁷⁴ or when the conduct of the fiduciary shows a lack of ability, sincerity, good faith and willingness to cooperate, rendering the fiduciary wholly unfit to properly administer the estate, removal is justified.¹⁷⁵

CHAPTER TWENTY: POWERS, DUTIES AND LIABILITIES OF GUARDIANS

A guardian of the person of an incapacitated individual has the duty to assert the rights and best interests of that person. Expressed wishes and preferences of the ward must be respected to the greatest possible extent. Additionally, when possible, the guardian is to assure and participate in the development of a plan of supportive services to meet the ward’s needs, encourage the incapacitated person to participate to the extent of his or her abilities in all decisions that affect him or her, to act on his or her own behalf whenever able, and to develop or regain his or her capacity to manage his or her own personal affairs.¹⁷⁶

¹⁷² 20 Pa.C.S.A. §§3184, 5515.

¹⁷³ *Scientific Living, Inc. v. Hohensee*, 440 Pa. 280, 270 A.2d 216 (1970), certiorari denied 91 S.Ct. 2189, 402 U.S. 1012, rehearing denied 92 S.Ct. 28, 404 U.S. 874.

¹⁷⁴ *In Re: Huff’s Estate*, 299 Pa. 200, 149 A. 179 (1930).

¹⁷⁵ *In Re: Haak’s Estate*, 24 Erie C.L.J. 65 (1942).

¹⁷⁶ 20 Pa.C.S.A. §5521(a).

Unless included in the guardianship order, a guardian or emergency guardian shall not have the power and duty to: “(1) Consent on behalf of the incapacitated person to an abortion, sterilization, psychosurgery, electroconvulsive therapy or removal of a healthy body organ; (2) Prohibit the marriage or consent to the divorce of the incapacitated person; (3) Consent on behalf of the incapacitated person to the performance of any experimental biomedical or behavioral medical procedure or participation in any biomedical or behavioral experiment.”¹⁷⁷ Similarly, a court may not grant to a guardian of an incapacitated person powers controlled by other statutes, including, but not limited to, the power (1) to admit the individual to an inpatient psychiatric facility or state center for the mentally retarded;¹⁷⁸ or, (2) to consent on behalf of the individual to the relinquishment of the person’s parental rights.¹⁷⁹

Should the court find that a “person is partially incapacitated and in need of guardianship services, the court [must] enter an order appointing a limited guardian of the person with powers consistent with the court’s findings of limitations, which may include:”¹⁸⁰ “(1) General care, maintenance and custody of the person.”¹⁸¹ “(2) Designating the place for the individual to live.”¹⁸² “(3) Assuring that the individual receives such training, education, medical and psychological services, and social and vocational opportunities, as appropriate, as well as, assisting the incapacitated person in

¹⁷⁷ 20 Pa.C.S.A. §§5521(d)(1), (d)(2), (d)(3).

¹⁷⁸ 20 Pa.C.S.A. §5521(f)(1).

¹⁷⁹ 20 Pa.C.S.A. §5521(f)(2).

¹⁸⁰ 20 Pa.C.S.A. §5512.1(b).

¹⁸¹ 20 Pa.C.S.A. §5512.1(b)(1).

¹⁸² 20 Pa.C.S.A. §5512.1(b)(2).

the development of maximum self-reliance and independence.”¹⁸³ “(4) Providing required consents or approvals on behalf of the incapacitated person.”¹⁸⁴ With the exception of those areas designated by the court “as areas over which the limited guardian has power, a partially incapacitated person retains all legal rights.”¹⁸⁵

A plenary guardian of the person may be appointed “only upon a finding that the person is totally incapacitated and in need of plenary guardianship services.”¹⁸⁶

Within the first twelve months of his or her appointment, and at least annually thereafter, a guardian of an incapacitated person has the duty to file a report with the court containing certain information as follows:

(A) for the guardian of the estate:

- (1) current principal and how it is invested;
- (2) current income;
- (3) expenditures of principal and income since the last report; and,
- (4) needs of the incapacitated person for which the guardian has provided since the previous report;

(B) for the guardian of the person:

- (1) current address and type of placement;
- (2) major medical or mental problems;
- (1) a description of the individual’s living arrangements and the social, medical, psychological, and other support services being received;
- (4) the guardian’s opinion relative to the continuation or modification of the guardianship; and,

¹⁸³ 20 Pa.C.S.A. §5512.1(b)(3).

¹⁸⁴ 20 Pa.C.S.A. §5512.1(b)(4).

¹⁸⁵ 20 Pa.C.S.A. §5512.1(g).

¹⁸⁶ 20 Pa.C.S.A. §5512.1(c).

- (5) the number and length of times the guardian has visited with the incapacitated person within the last year.¹⁸⁷

Additionally, within sixty days of the death of the incapacitated person or an adjudication of capacity and modification of the existing order, the guardian must also file a report with the court.¹⁸⁸ At a hearing on whether the guardian may consent to a particular act or omission, the guardian must report any knowledge that they may have to the court as it concerns the incapacitated person's expressed objection relative thereto, whether expressed prior to or subsequent to the determination of incapacity.¹⁸⁹

CHAPTER TWENTY-ONE: LEGAL EFFECT OF SPECIAL CIRCUMSTANCES

If two or more guardians of an estate of an incapacitated person are appointed by the court, the guardians jointly have charge of the management of the real and personal estate of the individual, such that they are regarded by law as one person and possess a joint authority where each is entrusted with the management of the estate. Therefore, a decree appointing multiple guardians and providing that the corporate guardian alone will "handle all funds" is not valid.¹⁹⁰ If a dispute arises among the guardians, "the decision of the majority [thereof] control[s] unless otherwise provided by the governing instrument, if any."¹⁹¹ A dissenting guardian must join with the majority to carry out the decision of the majority and may be court ordered to do so, if necessary. The dissenting guardian "shall not be liable for the consequences of the majority decision, even though

¹⁸⁷ 20 Pa.C.S.A. §5521(c)(1).

¹⁸⁸ 20 Pa.C.S.A. §5521(c)(2).

¹⁸⁹ 20 Pa.C.S.A. §5521(e).

¹⁹⁰ *In Re: Voshake's Guardianship*, 125 Pa. Super. 98, 189 A.2d 753 (1937).

¹⁹¹ 20 Pa.C.S.A. §§3328(a), 5521.

he [or she] joins in carrying it out, if his [or her] dissent is expressed promptly to all other [guardians].”¹⁹² However, “liability for failure to join in administering the estate, or to prevent a breach of trust, may not be thus avoided.”¹⁹³ Should one of two or more guardians of an incapacitated person be individually liable to the estate, the remaining guardian or guardians must pursue any legal action necessary against them to protect the estate.¹⁹⁴ Upon a dispute among guardians of an incapacitated person as to the exercise or non-exercise of their powers, and when no agreement can be reached by a majority of them, the court may direct the course of action to be taken based upon the best interests of the estate.¹⁹⁵

At the death, removal, or finding of incapacity of a guardian of an incapacitated person, any surviving or remaining guardians “have all the powers of the original [guardian], unless otherwise provided by the governing instrument.”¹⁹⁶ A substituted or succeeding guardian has, in addition to the powers of the guardian appointed, all powers, duties and liabilities of the original guardian, unless otherwise provided by the governing instrument.¹⁹⁷ Such a guardian also has the power to recover the assets of the incapacitated person from their predecessor in administration or from the fiduciary of the predecessor. The substitute or succeeding guardian stands in their predecessor’s stead for all purposes, except that they are not personally liable for the acts of their predecessor.¹⁹⁸ No act of administration performed by a guardian of an incapacitated person in good faith

¹⁹² 20 Pa.C.S.A. §§3328(a), 5521.

¹⁹³ *Id.*

¹⁹⁴ 20 Pa.C.S.A. §§3317, 5521.

¹⁹⁵ 20 Pa.C.S.A. §§3328(b), 5521.

¹⁹⁶ 20 Pa.C.S.A. §§3327, 5521.

¹⁹⁷ 20 Pa.C.S.A. §§5146(b), 5521.

¹⁹⁸ *Id.*

is impeached by the subsequent termination of the guardianship. Additionally, regardless of the good or bad faith of the guardian, no person who deals in good faith with the guardian is prejudiced by the subsequent termination thereof.¹⁹⁹

Upon the death of the incapacitated person, the guardian's legal power comes to an end and their sole responsibility then becomes to provide an account of the guardianship until the date of the ward's death.²⁰⁰ All claims against the incapacitated person's estate remaining unpaid at the time of death must be presented to the personal representative of the decedent.²⁰¹

CHAPTER TWENTY-TWO: SELECTED SPECIFIC POWERS AND DUTIES OF GUARDIANS

A guardian of an incapacitated person has the right to take possession of, maintain, and administer the real and personal property of the individual; this includes the right to prosecute any action with respect thereto.²⁰² Any proposal to "compromise or settle any claim, whether in suit or not, by or against an estate, or to compromise or settle any question or dispute concerning the validity or construction of the governing instrument,"²⁰³ or a distribution from the estate, or any other controversy affecting the estate may be decided by the court, which may then authorize the compromise or settlement to be entered into.²⁰⁴

¹⁹⁹ 20 Pa.C.S.A. §§5146(c), 5521.

²⁰⁰ *In Re: Frew's Estate*, 340 Pa. 89, 16 A.2d 26 (1940).

²⁰¹ 20 Pa.C.S.A. §5534.

²⁰² 20 Pa.C.S.A. §§5141, 5521.

²⁰³ 20 Pa.C.S.A. §§3323(a), 5521.

²⁰⁴ *Id.*

If any person makes a legally binding agreement to purchase or sell real or personal property and becomes incapacitated before its consummation, the individual's guardian has the power to conclude the transaction. Should the guardian fail to do so, the court, in its discretion, may order the specific performance of the contract if it would have been so enforced had the person not become incapacitated.²⁰⁵ The title of any such purchaser under the agreement in which the incapacitated person was the seller is the same as any title conveyed or transferred by the individual prior to their incapacitation.²⁰⁶

The guardian of an incapacitated person may not elect on behalf of such individual to take against the will of the incapacitated person's spouse unless authorized by the court. Any election filed by the guardian to take against the will of the individual's spouse without prior court approval is a nullity. As the true guardian of the incapacitated person, it is solely for the court to determine if such an election should be made, with the welfare of the incapacitated person being the primary basis upon which to rest its decision. If the needs of the incapacitated person are adequately provided for, the court should refrain from authorizing the election; as such an election would divert the assets of the deceased spouse away from that spouse's heirs to those of the incapacitated person.²⁰⁷

A guardian may abandon property of the incapacitated person's estate if it is so burdensome or encumbered as to be of no value to the estate. When title needs to be transferred for such an abandonment, the court "may authorize the guardian to transfer or renounce it without consideration if it shall find that this will be for the best interests of

²⁰⁵ 20 Pa.C.S.A. §§3390(a), 5521.

²⁰⁶ 20 Pa.C.S.A. §§3390(b), 5521.

²⁰⁷ *In Re: Peden's Estate*, 409 Pa. 194, 185 A.2d 794 (1962).

the estate.”²⁰⁸ A guardian may protect himself, his employees, and the estate by purchasing insurance against liability to third persons arising from the administration of the estate. The cost to purchase this insurance may properly be charged as an expense of the estate.²⁰⁹ The court may authorize the guardian to continue any business of the estate for the benefit of the estate,²¹⁰ and may authorize the guardian to organize a corporation to carry on the business of the estate.²¹¹ A guardian may vote stock, in person or by proxy, held by the estate,²¹² “may take property encumbered by a mortgage owned by the estate [through a] deed in lieu of foreclosure,”²¹³ and “may lease any real or personal property of the incapacitated person for a term not exceeding five years...”²¹⁴

The guardian must take possession of, maintain, and administer each real and personal asset of the incapacitated person, collect rents and income therefrom, and make reasonable expenditures necessary to preserve such assets.²¹⁵ A guardian may accept, hold, invest in, and retain investments as provided by the provisions of the Prudent Investor Rule, subject only to the terms of any governing instrument²¹⁶ and may sell, at public or private sale, any personal property of the incapacitated person.²¹⁷ Whenever the court finds it to be in the best interests of the incapacitated person, a guardian directed by the court may: (1) sell at public or private sale, pledge, mortgage, lease or exchange any real or personal property of the incapacitated person; (2) grant an option for the sale,

²⁰⁸ 20 Pa.C.S.A. §§5143, 5521.

²⁰⁹ 20 Pa.C.S.A. §§3313, 5521.

²¹⁰ 20 Pa.C.S.A. §§3314, 5521.

²¹¹ 20 Pa.C.S.A. §§3315, 5521.

²¹² 20 Pa.C.S.A. §§3320, 5521.

²¹³ 20 Pa.C.S.A. §§3322, 5521.

²¹⁴ 20 Pa.C.S.A. §5522.

²¹⁵ 20 Pa.C.S.A. §§5141, 5521.

²¹⁶ 20 Pa.C.S.A. §§5145, 5521.

²¹⁷ 20 Pa.C.S.A. §§5151, 5521.

lease or exchange of any such property; (3) join with the spouse of the incapacitated person in the performance of any of the foregoing acts relative to property held by the entireties; or, (4) release the right of the individual in the property of their spouse and join in a deed of the spouse on behalf of the incapacitated person.²¹⁸ The guardian may also, in the guardian's individual capacity, "bid for, purchase, take a mortgage on, lease or take by exchange real or personal property belonging to the estate"²¹⁹ of the incapacitated person, subject to the approval of the court with respect to the terms and conditions thereof.²²⁰

CHAPTER TWENTY-THREE: LIABILITIES OF THE GUARDIAN

A guardian of an incapacitated person who has committed a breach of duty relative to estate assets may be held liable for interest on those assets.²²¹ Any surcharge entered against the guardian must be paid by the guardian personally.²²²

Unless the guardian contracts otherwise, he or she is not personally liable on any written contract that is within their authority as guardian of the incapacitated person.²²³ Any action on the contract may be brought against the guardian in their fiduciary capacity only, or against their successor in such capacity. Execution upon any judgment obtained through such an action may be had only against property of the incapacitated person's estate.²²⁴

²¹⁸ 20 Pa.C.S.A. §§5155, 5521.

²¹⁹ 20 Pa.C.S.A. §§3356, 5521.

²²⁰ *Id.*

²²¹ 20 Pa.C.S.A. §§3544, 5533.

²²² *In Re: Hill's Estate*, 250 Pa. 107, 95 A. 426 (1915).

²²³ 20 Pa.C.S.A. §§3331, 5521.

²²⁴ *Id.*

If a guardian enters into a contract not requiring court approval, or if the court approves the contract requiring court approval, neither inadequacy of consideration nor the receipt of an offer to deal on other terms relieves the guardian of the obligation to perform their contract, nor shall it constitute grounds for the court to set aside the agreement, or to refuse to enforce it by specific performance.²²⁵ However, this does not prevent the court from using its inherent powers to set aside such a contract for fraud, accident, or mistake nor does it affect the liability of the guardian for surcharge on grounds of negligence or bad faith in making the contract.²²⁶

CHAPTER TWENTY-FOUR: ACCOUNTS, AUDITS AND REVIEWS

A guardian must file an account of their administration of the estate whenever directed to do so by the court or may file an account at the termination of the guardianship or at any other time or times authorized by the court.²²⁷ Written notice of the filing of the account and its call for audit or confirmation must be given by the guardian to every unpaid claimant who has given written notice of his claim to the guardian, as well as to every other person known to the accountant to have an interest in the estate as beneficiary, heir or next-of-kin.²²⁸

A guardian filing an account must file a statement of proposed distribution or a request that distribution be determined by the court with notice thereof being given by advertisement.²²⁹ Objections to the account may be filed as provided by local rules.²³⁰

²²⁵ 20 Pa.C.S.A. §§3360(a), 5521.

²²⁶ *Id.*

²²⁷ 20 Pa.C.S.A. §5531.

²²⁸ 20 Pa.C.S.A. §§3503, 5533.

²²⁹ 20 Pa.C.S.A. §§3513, 5533.

No account will be confirmed or statement of proposed distribution approved until an adjudication is filed expressly confirming the account or approving the statement of proposed distribution and specifying the names of the persons to whom the balance available for distribution is awarded and the amount or share awarded to each.²³¹

Persons having claims against an incapacitated person's estate arising out of the administration or distribution thereof, which are not reported to the court as claims and who fail to present such claims at audit or confirmation, are barred against any property distribution pursuant to such audit or confirmation.²³² However, if any party in interest, within five years after the final confirmation of the account of the guardian files a petition to review any part of the account, or of the adjudication, or of the decree of distribution, setting forth specifically alleged errors therein, the court will give such relief as equity and justice requires. However, "no such review [will] impose liability on the [guardian] as to property which was distributed by [the guardian] in accordance with a decree of court before the filing of the petition."²³³

A review of a confirmed account or distribution is traditionally granted as of right only where there are errors of law appearing on the face of the record, new matter has arisen since confirmation of the account or decree, or where justice and equity require review and no person will suffer.²³⁴ The court may always exercise its sound discretion and direct review of a decree of distribution if it were entered or induced through

²³⁰ 20 Pa.C.S.A. §§3513, 5533.

²³¹ 20 Pa.C.S.A. §§3514, 5533.

²³² 20 Pa.C.S.A. §§5167, 5533.

²³³ 20 Pa.C.S.A. §§3521, 5533.

²³⁴ *In Re: Jones*, 442 Pa. Super. 463, 660 A.2d 76 (1995), reargument denied, appeal denied 543 Pa. 729, 673 A.2d 335.

fraud.²³⁵ However, a party may not raise an issue of which he or she was aware of prior to the final adjudication under this provision.²³⁶ To justify the opening of an audit of an account on the basis of after-discovered evidence, such evidence must have been discovered since the confirmation, must be the type that would not have been obtainable at the hearing by the use of reasonable diligence, and must not be cumulative nor merely go to impeach the credibility of a witness.²³⁷

After confirmation of the account, a guardian is “relieved of liability with respect to all real and personal estate distributed in conformity with a decree of court.”²³⁸ When making “such distributions, the [guardian] shall not be entitled to demand refunding bonds from the distributees, except as provided by [the statute] or as directed by the court.”²³⁹ The court may also “order the estate to be distributed in kind to the parties in interest, including fiduciaries.”²⁴⁰

A court should appoint a guardian ad litem for the incapacitated person where exceptions to the guardian’s account are filed on behalf of the incapacitated person and claims are thereby brought to the attention of the court. These claims must be effectively presented to the court at hearing by someone legally authorized to do so on behalf of the incapacitated person. The incapacitated person is not disqualified because of his or her prior adjudication, and may testify at the hearing on the objections.²⁴¹

²³⁵ *In Re: Marushak’s Estate*, 488 Pa. 607, 413 A.2d 649 (1980).

²³⁶ *In Re: Litostansky’s Estate*, 499 Pa. 321, 453 A.2d 329 (1982).

²³⁷ *In Re: Weber’s Estate*, 57 Berks 89 (1965).

²³⁸ 20 Pa.C.S.A. §§3533, 5533.

²³⁹ *Id.*

²⁴⁰ 20 Pa.C.S.A. §§3534, 5533.

²⁴¹ *In Re: Sigel*, 372 Pa. 527, 94 A.2d 761 (1953).

“Upon the audit of the account of the guardian of [an incapacitated] person who died during incapacity”²⁴² the judge must not “pass upon any claims against the estate of the incapacitated individual other than necessary administration expenses, including the compensation of the guardian and his [or her] attorney.”²⁴³ All other claims remaining unpaid at the time of the individual’s death are to be presented to the personal representative.²⁴⁴ Compensation to the guardian shall be allowed by the court as is reasonable and just in light of the circumstances and may be calculated on a graduated percentage.²⁴⁵ A judge has the authority to pass upon the reasonableness of counsel fees of an incapacitated person’s guardian, regardless of whether any party in interest files an objection to the amount of counsel fees claimed. The amount of fees to be allowed counsel is within the discretion of the court and its decision will not be interfered with except for palpable error²⁴⁶ or an abuse of discretion.²⁴⁷

CHAPTER TWENTY-FIVE: DISTRIBUTION

A guardian may spend monies received by him or her for the care and maintenance of ward, without further court intervention.²⁴⁸ The court

may authorize or direct the payment or application of any or all of the income or principal of the estate of the incapacitated person for the care, maintenance or education of the incapacitated person, his [or her] spouse, children, or those for whom [the incapacitated person] was making provision before their incapacity, or for the reasonable

²⁴² 20 Pa.C.S.A. §5534.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ 20 Pa.C.S.A. §3537.

²⁴⁶ *In Re: Palmer’s Estate*, 373 Pa. 438, 96 A.2d 143 (1953).

²⁴⁷ *In Re: Pryor’s Estate*, 150 Pa. Super. 75, 27 A.2d 466 (1942).

²⁴⁸ 20 Pa.C.S.A. §5536.

funeral expenses of the incapacitated person's spouse, children, or indigent parent.²⁴⁹

The court has the power to substitute its judgment for that of the incapacitated person with respect to the estate and affairs of such individual for the benefit of the incapacitated person, their family, members of their household, their friends and charities in which they were interested. This power shall include, but not be limited to, the power to:

(1) Make gifts, outright or in trust. (2) Convey, release or disclaim his contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety. (3) Release or disclaim his powers as trustee, personal representative, custodian for minors, or guardian. (4) Exercise, release or disclaim his power as donee of a power of appointment. (5) Enter into contracts. (6) Create for the benefit of the incapacitated person or others, revocable or irrevocable trusts of his property which may extend beyond his disability or life. (7) Exercise options of the incapacitated person to purchase or exchange securities or other property. (8) Exercise all rights and privileges under life insurance policies, annuity contracts or other plans or contractual arrangements providing for payments to the incapacitated person or to others after his death. (9) Exercise his right to claim or disclaim an elective share in the estate of his deceased spouse and renounce any interest by testate or intestate succession or by inter vivos transfer. (10) Change the incapacitated person's residence or domicile. (11) Modify by means of codicil or trust amendment, as the case may be, the terms of the incapacitated person's will or any revocable trust created by the incapacitated person, as the court may deem advisable in light of changes in applicable tax law.²⁵⁰

²⁴⁹ 20 Pa.C.S.A. §5536(a).

²⁵⁰ 20 Pa.C.S.A. §5536(b)(1-11).

The court may also adopt a plan of gifting which results in minimizing current or future taxes, or which carries out a lifetime giving pattern of the incapacitated person, if the court is satisfied that sufficient assets exist for the benefit of the incapacitated person.²⁵¹

A guardian may be authorized by the court to retain sufficient assets as deemed appropriate for the anticipated funeral expenses of the incapacitated person. These assets are exempt from all claims including those of the Commonwealth.²⁵²

CHAPTER TWENTY-SIX: GUARDIANSHIP SUPPORT AGENCIES

As an alternative to guardianships, guardianship support agencies were authorized by the Pennsylvania legislature to provide services, to those “individuals whose decision-making ability is impaired, to serve as guardian when an individual is found to need a guardian and no other person is willing and qualified to serve...”²⁵³ These agencies may serve as guardian of the estate only, or guardian of the person only, or jointly as both, “when no less restrictive alternative will meet the [individual’s] needs.”²⁵⁴ The agency itself may be appointed guardian as no individual must be specified by the court.²⁵⁵ In addition to the powers, duties, and liabilities of other guardians, a guardianship support agency has the power and duty to:

- (1) Invest the principal and income of incapacitated persons for whom it is the guardian of the estate. For this purpose, it may pool the principal and income, but shall maintain an individual account for each incapacitated person reflecting

²⁵¹ 20 Pa.C.S.A. §5536(b).

²⁵² 20 Pa.C.S.A. §5537.

²⁵³ 20 Pa.C.S.A. §5551.

²⁵⁴ 20 Pa.C.S.A. §5553(a).

²⁵⁵ *Id.*

the person's participation therein. (2) Expend and, if necessary, advance costs necessary to administer guardianships for which it has been appointed guardian. (3) Apply for letters or otherwise administer the estate of any incapacitated person for whom it has been appointed guardian who dies during the guardianship when no one else is willing and qualified to serve.²⁵⁶

Recipients of guardianship support agency services are to be charged for these services based upon their ability to pay.²⁵⁷

CHAPTER TWENTY-SEVEN: WHEN GUARDIANSHIPS ARE NOT NECESSARY

When the entire real and personal estate of an incapacitated person has a net value of Twenty-Five Thousand Dollars (\$25,000.00) or less, it may be held by such individual without the appointment of a guardian in any of the following circumstances: (1) when the court having jurisdiction of the incapacitated person's estate or trust in awarding the interest so directs;²⁵⁸ (2) when the court having jurisdiction to direct the sale or mortgage of real estate in which the incapacitated person has an interest so directs;²⁵⁹ or, (3) when the court having jurisdiction to appoint a guardian of the incapacitated person so directs.²⁶⁰

The court may also direct the person or institution maintaining the incapacitated person to execute as natural guardian any receipt, deed, mortgage or other appropriate instrument, necessary to carry out a decree entered under the above described three circumstances pursuant to 20 Pa.C.S.A. §5101, i.e., When guardian unnecessary. In such

²⁵⁶ 20 Pa.C.S.A. §5553(b).

²⁵⁷ 20 Pa.C.S.A. §5555.

²⁵⁸ 20 Pa.C.S.A. §§5101(1), 5505.

²⁵⁹ 20 Pa.C.S.A. §§5101(2), 5505.

²⁶⁰ 20 Pa.C.S.A. §§5101(3), 5505.

event, the court may then require the deposit of money into a savings account or the care of securities in any manner considered to be in the best interests of the incapacitated person. Such a decree shall then constitute authority for all those dealing with the property of the incapacitated person “to recognize the persons named therein as entitled to receive the property, and shall in all respects have the same force and effect as an instrument executed by a duly appointed guardian under court decree.”²⁶¹

Lastly, without the appointment of a guardian, any amount may be ordered by the court to be deposited in one or more savings accounts in the name of the incapacitated person, in banks and other institutions insured by a Federal government agency, provided that the amount deposited in any one institution does not exceed the amount to which such accounts are insured. Every order must contain a provision that no withdrawal can be made from such account except as authorized by subsequent order of court.²⁶²

²⁶¹ 20 Pa.C.S.A. §§5102, 5505.

²⁶² 20 Pa.C.S.A. §§5103, 5505.

PART THREE: CONCLUSION AND RECOMMENDATIONS

The importance associated with the appointment of a permanent plenary guardian of the person and for the estate of an alleged incapacitated person is best summarized as, “There never has been a time in the history of the Orphans’ Court, from its beginning in the City of London, centuries ago, until today, when the judges did not have imposed upon them the duty of inspection to prevent wrongs being done to wards of the court.”²⁶³ From designing relatives, to internet scams or others intent upon taking advantage of weak-minded individuals, the last defense often available to these persons is a judge, whose duty is to prevent the exact dishonorable and unethical acts attempted to be perpetrated against these alleged incapacitated persons, by those they often trust the most.

As a result of this research, I have denied jurisdiction to two cases filed within my county because jurisdiction did not rest here, but rather in two adjacent counties. Previously, these cases would have been accepted for adjudication in my county, even though subject matter jurisdiction was not proper. This could have resulted in any decision that was rendered being subsequently overturned on appeal. In another case, I instructed the plenary guardian that I had just appointed, on behalf of the then adjudicated incapacitated person, to immediately investigate a prior real estate transaction that involved this individual because of an apparent lack of adequate consideration for the sale. I was aware of my ability to so instruct the guardian based upon information that I obtained through this Thesis. A court has jurisdiction to review the propriety of transactions by the incapacitated person that occurred prior to the date of the adjudication

²⁶³ *In Re: Harton’s Estate*, 86 Pitts. L.J. 18 (1938), affirmed 1 A.2d 292, 331 Pa. 507.

of incapacity no matter when made,²⁶⁴ and places the burden upon the grantee to then prove both appropriate mental capacity and the fairness of the transaction at the time of the bargain.²⁶⁵

A further example of the benefits obtained through this undertaking is exemplified by the limitations placed upon the stated desires of the incapacitated person. As outlined above, the designation of a guardian by the incapacitated person in a previously executed durable power-of-attorney is to be honored by the court, when possible and appropriate. However, this earlier expressed desire for a specifically named guardian or fiduciary is not without limitation as to the documents which the court may examine to obtain this information. When a testamentary writing of an adjudged incapacitated person is placed in the custody of the court, such a writing must be kept sealed and held privately and confidentially, the substance of this writing must not be made known in any manner whatsoever, and a revelation by the court of the contents of this document for the selection of a particular guardian of the incapacitated person was held to be improper.²⁶⁶

A) The Appointment of a Visitor to Supplement the Formal Assessment

In certain proceedings it may be advisable for a court to appoint a “visitor” whose report to the court would supplement the formal assessment, provide more information regarding the proposed ward’s living conditions, and any proposed changes by the petitioner.

The visitor should have a background that qualifies him or her for such a

²⁶⁴ *In Re: Lang*, 456 Pa. Super. 214, 690 A.2d 256 (1997).

²⁶⁵ *Smouse Estate*, 14 Fiduc. Rep. 2d 174 (Fay. 1993).

²⁶⁶ *In Re: Widener’s Estate*, 437 Pa. 294, 263 A.2d 334 (1970).

position.²⁶⁷ This individual would visit and interview the alleged incapacitated person, the petitioner, and the individual nominated to serve as guardian.²⁶⁸ “Additionally, he or she [would] visit the residence of the alleged incapacitated person, and the place where it is proposed that he or she reside if a guardian is appointed.”²⁶⁹ The visitor may also investigate the existence of any possible conflict of interest for the person nominated to serve as guardian.²⁷⁰ Furthermore, the visitor could, and should, if appropriate, explain the proceedings to the proposed ward and obtain his or her views, as well as discuss any alternative resource plan.²⁷¹

In their written report to the court the following areas should be addressed:

a description of the nature and degree of any current impairment of the proposed ward’s understanding or capacity to make or communicate decisions; a statement of the qualifications and appropriateness of the proposed guardian; recommendations, if any, on the powers to be granted to the proposed guardian, including an evaluation of the proposed ward’s capacity to perform [certain enumerated functions]; an assessment of the proposed ward’s capacity to perform the activities of daily living.²⁷²
(brackets in original)

Possible visitors include psychologists, social workers, gerontologists, nurses, probation officers, former guardians, or attorneys.²⁷³ Court visitors may be salaried members of the court staff, but could also be well-trained volunteers.

²⁶⁷ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 236.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 237.

²⁷³ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 66.

At a time when public funds appropriated for courts are decreasing, courts could utilize qualified volunteers to provide visitor services. Unfortunately, due to budgetary constraints, courts by necessity may require the assistance of volunteers to guarantee that they continue to function effectively so as to provide suitable guardianship support services.²⁷⁴

As with any volunteer program, issues of recruitment, funding, supervision, and training are critical. The American Association of Retired Persons (AARP) has developed a twelve hour training module for potential volunteers that encompasses guardianship law and process, typical physical and mental impairments of possible wards, communication techniques, detection of abuse and neglect, ethics, confidentiality, and how to complete the reporting documents. Direct mail requests to AARP members, as well as E-mail and newspaper promotions could be employed to locate volunteers. Most jurisdictions using volunteers rely on court employees to act as volunteer coordinators. The coordinator's responsibilities are usually in addition to their other court functions.²⁷⁵

B) More Rigorous Requirements With Regard to Petitions

Requiring guardianship petitions to be more "informative and specific can provide increased protection for the proposed ward by discouraging unfounded filings, and providing defense counsel with a more enlightened understanding of the allegations

²⁷⁴ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 79.

²⁷⁵ *Id.* at 125-126.

against the proposed ward.”²⁷⁶ This knowledge will aid counsel in preparing for trial, including determining the best manner to present evidence, “[in] identify[ing] potential witnesses, and [in] analyz[ing] less restrictive alternatives to guardianship.”²⁷⁷

In this regard, petitions should contain specific allegations of alleged incapacity, provide substantiation for their claims, identity the petitioner’s interest in the matter, and describe the qualifications of the proposed guardian.²⁷⁸ Other information that may be in the petition include: the particular powers and duration of the guardianship being sought, said powers’ relationship to the functional level of the individual, any presumptive heirs of the alleged incapacitated person, and an averment that available alternative resources have been explored.²⁷⁹

C) Specificity Required in the Court’s Findings and Orders

The rigorous standard of proof required to declare an individual incapacitated, clear and convincing evidence, should be accompanied by demands that the court state in its order very specific finding to support the need for a guardian. A court should be required to make all of the following findings:²⁸⁰

that the proposed ward is an incapacitated person and the exact nature and scope of the incapacity; that no alternative resource plan is available that is suitable to protect the proposed ward’s health, safety, or habilitation; that the court has considered less restrictive alternatives and that the powers and duties conferred upon the guardian are appropriate as the least restrictive form of intervention consistent with the preservation of the liberties of the

²⁷⁶ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults’ Decision-Making and the Law*, New York, NY: Springer Publishing Company, 241.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 240-241.

²⁸⁰ *Id.* at 243.

proposed ward; that appointment of a guardian is necessary as the best means to provide for the continuing care and supervision of the proposed ward; [and,] that the proposed guardian is qualified, suitable, and willing to serve.²⁸¹

D) The Right to Continuing Counsel as Advocate

Continued advocacy on behalf of the ward, by his or her attorney, after the appointment of a guardian would be advantageous.²⁸² The periodic review of the continuing need for guardianship, as well as facilitating the termination or modification of the guardianship, provide opportunities for continuing intervention on behalf of the ward by counsel. Also, in cases of limited guardianship, the ward may desire counsel to ensure that his or her reserved rights are preserved.²⁸³

E) Monitoring of Guardianships

Monitoring is the process by which the court that established the guardianship determines that the purpose of the guardianship, to protect an incapacitated person, is being fulfilled. The ward, found to be legally vulnerable and bereft of civil rights, must rely on the court for protection. Once the court has assumed the role of protector, it has a continuing legal and moral duty to make certain that the required protection is a reality.

Unfortunately, not all courts acknowledge their ongoing role to monitor guardianship cases to ensure that guardians are serving the best interests of their wards. The ward in a guardianship, having been found to be defenseless, incapable of making decisions, and devoid of legal rights, is rarely able to come into court to enforce the order

²⁸¹ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 244.

²⁸² *Id.* at 239.

²⁸³ *Id.*

or complain of the guardian's actions, yet it is the person the court has found legally incapacitated who is most likely to be harmed by a guardianship order, and to need further court assistance.

The primary means of monitoring is guardian self-reporting. The reports should include an inventory of all of the ward's assets, due within the first two or three months after the guardian is appointed, and an accounting of receipts and disbursements provided at some intervals during the term of their guardianship. When a guardian has both personal and financial responsibilities, a report should be required to be filed for each.

Experience shows that unless courts take steps to enforce the reporting requirements, guardians will file few reports. Courts that routinely send reminder notices to the guardians, when a report is due or overdue, have higher rates of return. To enforce these reporting requirements, courts may impose sanctions such as orders to appear in court, fines for late reports, or even removal of the guardian.

Effective monitoring requires not only that the guardian file the report, but that someone must review the report. A competent person should examine the personal report and financial accounting for completeness and accuracy, along with analyzing the appropriateness of the guardian's expenditures and actions. Because of the inherent hazards of self-reporting by the guardian, documentary verification should be required to accompany the financial accounting statement. This should include receipts to confirm disbursements, bank statements to corroborate income, and broker or realtor reports to substantiate investment and asset value.²⁸⁴

²⁸⁴ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 115-121.

F) A Comprehensive Process is Required

Courts should take the necessary steps to address their responsibility to ascertain that the purpose of the guardianship is assured by providing wards with the maximum protection of the court. Improving the quantity and quality of supervision over guardians by enforcing reporting requirements, investigating the validity of reports of abuse or neglect, and changing orders or imposing sanctions where appropriate are all the ongoing obligation of the court. A guardianship case does not end with the entry of an order. Rather the entry of such an order is just the beginning of a continuing judicial responsibility to make certain that the protective purpose of the guardianship proceeding is being fulfilled.²⁸⁵

In 1928, Justice Louis Brandeis issued the following warning against allowing benevolent purposes to obscure recognition of government infringement on individual liberty:²⁸⁶

Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent [sic]. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.²⁸⁷

Current guardianship laws reflect this concern that the individual right to autonomous decision-making and self-determination be protected from infringement, even infringement by those with beneficent purposes. These reformed statutes are

²⁸⁵ Zimny, G. H., & Grossberg, G. T. (Eds.) (1998), *Guardianship of the Elderly, Psychiatric and Judicial Aspects*, New York, NY: Springer Publishing Company, 129-131.

²⁸⁶ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 244.

²⁸⁷ *Olmstead v. United States*, 227 US 438, 439 (1928) (Brandeis dissenting).

intended to reverse the paternalistic approach of the past, and provide strong protection to those less fortunate individuals for whom judicial protection is sought through guardianship.

The challenge before us is to monitor the import of these laws to guarantee that they are fulfilled in the way intended: to establish a process that will, on a case-by-case basis, balance the individual's right to autonomy and independent decision-making against the need for some degree of protective intervention.²⁸⁸

²⁸⁸ Smyer, M., Schaie, K. W., & Kapp, M. B. (Eds.) (1996), *Older Adults' Decision-Making and the Law*, New York, NY: Springer Publishing Company, 245-247.

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